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No. 82-1085

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBIN W. WALLER, Workmen's Compensation Commissioner, Second District, State of Connecticut; JOHN A. ARCUDI, CHAIRMAN, Board of Compensation Commission, State of Connecticut,

Appellants,

v.

STONE & WEBSTER ENGINEERING CORPORATION,

Appellee.

On Appeal From The United States Court Of Appeals For The Second Circuit

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Second Circuit properly conclude that subject matter jurisdiction under 28 U.S.C. § 1331 existed in this case where the complaint sought a declaration that federal law preempts state law and an injunction to prohibit the further enforcement of that state law against the plaintiff?

2. Did the United States Court of Appeals for the Second Circuit properly conclude that Section 31-51h of the Connecticut General Statutes, as applied to the employee benefit plan in issue, is superseded by the Employment Retirement Income Security Act (ERISA), pursuant to the express provisions of 29 U.S.C. § 1144, and thus, void under the Supremacy Clause of the Constitution of the United States?

PARTIES TO THIS ACTION

The Jurisdictional Statement sets forth the parties to this action.

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IN THE
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No. 82-1085

ROBIN W. WALLER, Workmen's Compensation Commissioner, Second District, State of Connecticut; JOHN A. ARCUDI, CHAIRMAN, Board of Compensation Commission, State of Connecticut,

Appellants,

v.

STONE & WEBSTER ENGINEERING CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment of the Court of the Appeals for the Second Circuit be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit, issued September 30, 1982, is reported at 690 F.2d 323. (See JA. 3a).[1] The opinion of the United States District Court for the District of Connecticut is reported at 518 F. Supp. 97. (See JA. 18a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the constitutional and statutory provisions listed in the Jurisdictional Statement and reprinted in its appendix, the following statutes are relevant to this proceeding:

[1]Citations to the Appendix to the Jurisdictional Statement will be denominated by "JA." while citations to the Appendix to the Motion to Affirm will be denominated by "App."

1. Connecticut Public Act 82-398, effective October 1, 1982, amending Conn. Gen. Stat. § 31-51h and renumbering it Conn. Gen. Stat. § 31-284b. (See App. B, 6a-9a).

2. Periodic Payment Settlement Act of 1982, Pub. L. No. 97-473, §§ 301, 302, effective January 14, 1983, amending §§ 3 and 514(b) of ERISA (29 U.S.C. § 1144(b)). (See App. C, D, 10a-17a).

STATEMENT OF THE CASE

Stone & Webster is a party to a collective bargaining agreement entered into with the Sprinkler Fitters Union Local 676 (hereinafter the "Agreement"). The Agreement provides, inter alia, that Stone & Webster will pay into the National Automatic Sprinkler Industry Welfare Fund (hereinafter the "Fund") seventy-five cents per hour "for all hours worked by covered employees." The Fund provides medical, surgical, and life insurance benefits for eligible employees and their dependents. (JA. 7a). Benefits continue for a year after cessation of contributions.

Stone & Webster has complied with its obligations under the Agreement. However, it has not continued contributions to the Fund as required by Conn.

Gen. Stat. § 31-51h, providing that:

> [N]o employer . . . shall . . . cease to make payments or contributions . . . to an employee's welfare fund [on behalf of an employee or former employee who is] eligible to receive or is receiving workers' compensation payments . . . or is receiving a continuation of salary or wages under a provision for sick leave payments for time lost for on the job injury.[2] (JA. 38a, 39a).

Stone & Webster's position is that, as applied to the ERISA benefit plan here at issue, this statute is superseded by 29 U.S.C. § 1144(a) (part

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[2]This language was not altered by the 1981 amendment, Conn. Pub. Act 81-464, (JA. 38a-43a) but was altered by the 1982 amendment, Conn. Pub. Act 82-398. (App. B, 6a). The injury to defendant Ilsley occurred on January 30, 1979 (JA. 6a), prior to the 1981 amendments.

of the Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq. ("ERISA")) which provides that ERISA supersedes "any and all state laws insofar as they may now or hereafter relate to" any ERISA benefit plan. (JA. 37a).

One of the persons affected by Stone & Webster's failure to comply with Conn. Gen. Stat. § 31-51h is Ilsley, who received workers' compensation but for whom no Fund contributions were made with reference to his period of compensation. (JA. 7a). Ilsley therefore challenged Stone & Webster's discontinuation of welfare fund payments before the Workers' Compensation Commission. He contended that Conn. Gen. Stat. § 31-51h required Stone & Webster to continue contributions to the Welfare Fund on

his behalf. Stone & Webster contended that since its employee benefit plan is covered by ERISA, Conn. Gen. Stat. § 31-51h is preempted. Workmen's Compensation Commissioner Waller disagreed with Stone & Webster's position and held that in the absence of direct conflict, state and federal law operate concurrently as to ERISA benefit plans. (JA. 7a). An intra-agency appeal of Commissioner Waller's decision is pending. (JA. 7a).

Plaintiff then filed its complaint herein in the District Court of Connecticut against the Sprinkler Fitters Union Local 676, the Fund, Ilsley and the appellants in this proceeding: Robin W. Waller, Workmen's Compensation Commissioner, Second District, State of Connecticut and John A. Arcudi, Chairman,

Board of Compensation Commissioners, State of Connecticut (hereinafter the "State of Connecticut"). The complaint requested a judgment declaring that Conn. Gen. Stat. § 31-51h, as applied to the Stone & Webster employee benefit plan, is preempted by ERISA, and an injunction prohibiting the enforcement of Conn. Gen. Stat. § 31-51h. (JA. 5a-7a). The District Court, by Chief Judge T. Emmet Clarie, ruled that the court had federal question jurisdiction over the case pursuant to 28 U.S.C. § 1331 and that Section 31-51h, "as to the benefit plan at issue," is preempted by ERISA. (JA. 19a, 27a).

Ilsley, the Union and the State of Connecticut appealed the District Court's decision to the Second Circuit. After concluding that the case met the

many "arising under" tests for federal jurisdiction (28 U.S.C. § 1331), the Court of Appeals affirmed the judgment of the District Court in all respects. (JA. 12a, 17a).

The Court of Appeals viewed this Court's decision in Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) as controlling and dispositive of the issues in this case. Under the guidance of Alessi, the Court of Appeals determined that the Connecticut statute "relates to" an employee benefit plan, which is, "by its own terms expressly subject to ERISA." The court also concluded that the Connecticut statute was not exempted from preemption under any theory articulated by the appellants. (JA. 13a-17a).

Despite the clear language from this Court in Alessi and from federal courts throughout the country, and despite the fact that all other defendants decided not to appeal, the State of Connecticut has nevertheless persisted and filed the instant appeal.

REASONS FOR AFFIRMING THE JUDGMENT BELOW

I. Appellants' Suggestion Of Mootness Is Without Merit.

In their Jurisdictional Statement, as their first point, appellants argue that the 1981 modification of § 31-51h of the Connecticut General Statutes has rendered this case moot.

This claim is without merit.

The statutory change referred to was in effect at the time of the argument before the United States Court

of Appeals, and, as appellants admit, they made no claim of mootness before that court.

Even more telling is the fact that after appellants filed their Jurisdictional Statement with this Court containing their mootness claim, they proceeded to ask the Court of Appeals to recall the mandate herein and issue a stay of its mandate, on the grounds that unless stayed, the decision could result in irreparable injury. (See App. A, 1a). This is hardly consistent with a claim of mootness.

The case is not moot (1) because former Conn. Gen. Stat. § 31-51h is still being applied as to persons injured before the changes in the statute and (2) because the amendments to Conn.

Gen. Stat. § 31-51h have not eliminated its objectionable aspects.

That the application of the old statute still has relevance is illustrated by the agency proceedings to procure payments from Stone & Webster pursuant to Conn. Gen. Stat. § 31-51h with reference to the period of Ilsley's disability. Despite the ruling of the Court of Appeals, appellants have declined to discontinue such proceedings, citing the pendency of this appeal.

In general, former Conn. Gen. Stat. § 31-51h has continuing relevance to any situation where payments have not been made as to pre-amendment injuries.

A judgment cannot be vacated as moot when there still exists a controversy requiring a ruling as to the constitutionality of a repealed statute. Kirchberg v. Feenstra, 450 U.S. 455, 458

(1981); New York City Transit Authority v. Beazer, 440 U.S. 568, 581 (1979); Bullock v. Carter, 405 U.S. 134, 142 n.17 (1972); Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 372 n.2 (1974); FTC v. Goodyear Tire & Rubber Co., 304 U.S. 257 (1938).

Aside from the continued relevance of the old versions of the statute, it is clear that the deficiencies in former Conn. Gen. Stat. § 31-51h continue in the amended versions of the statute. Under Conn. Gen. Stat. § 31-51h, as modified by Conn. Pub. Act 81-464, Stone & Webster was still required to furnish contributions in order to continue benefits on behalf of employees receiving workers' compensation. The same is true of the changes in 1982, Conn. Pub. Act 82-398, not referred to by

appellants, which renumbers Conn. Gen. Stat. § 31-51h (now § 31-284b) and makes cosmetic changes which are not of substance and which continue the employer's obligation to furnish benefits as provided in any applicable ERISA benefit plan, during the period of a worker's disability.

An attack on a statute is mooted by new legislation only if such legislation eliminates the aspects of the old law which gave rise to the challenge. See National Coal Operators' Association v. Kleppe, 423 U.S. 388, 393, 394 n.4 (1976); Brockington v. Rhodes, 396 U.S. 41, 43 (1969); Abie State Bank v. Bryan, 282 U.S. 765, 781 (1931); Montana Wilderness Association v. United States Forest Service, 655 F.2d 951, 958 (9th Cir. 1981); Ciudadanos Unidos De San Juan v.

Hidalgo County Grand Jury Commissioners, 622 F.2d 807, 824 (5th Cir. 1980), cert. denied, 450 U.S. 964 (1981). Clearly the 1981 (and 1982) amendments did not eliminate the objectionable aspects of the original statute.

Hence, the case should not be dismissed as moot. However, to the extent the appellants' claims of mootness can be viewed as a claim that the issues involved have no great importance to them, it would seem particularly appropriate for the Court to summarily affirm the judgment below rather than order plenary argument.

II. Appellants' Attack On The Jurisdiction Of The Courts Below Is Not Substantial Enough To Warrant Further Argument.

The Court of Appeals, in affirming the decision of the District

Court, determined that federal question jurisdiction (28 U.S.C. § 1331) existed in this case.[3] After recognizing different tests that have been applied in this context, the court specifically held that "this case meets the many 'arising under' tests for federal jurisdiction." 690 F.2d at 328.

The Second Circuit is clearly correct in this view, especially since this Court and other courts have regularly exercised jurisdiction in cases of this nature.

In this action, Stone & Webster sought a declaration that federal law preempts state law and an injunction to prohibit the further enforcement of that

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3Jurisdiction was also claimed pursuant to 28 U.S.C. § 1337 (jurisdiction to regulate commerce and antitrust).

state law against it. This claim invoked the federal court's long-standing jurisdiction to determine the constitutionality of state statutes and issue injunctions prohibiting the enforcement of those found to be unconstitutional. See Louisville & Nashville Railroad v. Greene, 244 U.S. 522 (1917); Columbus Railway Power & Light Co. v. City of Columbus, 249 U.S. 399 (1919); AFL v. Watson, 327 U.S. 582 (1946); Ex Parte Young, 209 U.S. 123, 160 (1908).

Resolution of Stone & Webster's claims required the construction of federal law, thus satisfying one of the most pervasively applied tests for establishing federal question jurisdiction: whether the claim "will be supported if the Constitution or laws of the United States are given one

construction or effect, and defeated if they receive another." Gully v. First National Bank in Meridian, 299 U.S. 109, 112 (1936). See also King County, Washington v. Seattle School District # 1, 263 U.S. 361 (1923); Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921).

Furthermore, because questions of federal law predominate in this action, federal jurisdiction was clearly appropriate. See Gully, 299 U.S. at 112. In the preemption context, "federal law, by definition, provides the only basis for the plaintiff to gain the relief that it seeks." Billy Jack For Her, Inc. v. New York Coat, Suit, Dress, Rainwear & Allied Workers' Union, 511 F. Supp. 1180, 1187 (S.D.N.Y. 1981). Moreover, rights and obligations with respect to ERISA plans are to be governed not by state law

but rather by federal common law as developed by the federal courts. See Riley v. MEBA Pension Trust, 570 F.2d 406, 413 (2d Cir. 1977); Amato v. Bernard, 618 F.2d 559, 567 (9th Cir. 1980). The same is true as to the underlying Agreement. See 29 U.S.C. § 185.

The foundation for federal question jurisdiction in this case was laid by the claims made, and the relief sought, in Stone & Webster's complaint itself. Since jurisdiction would have existed based on the claim for injunctive relief, the declaratory judgment procedure was not used to create jurisdiction where it would not have existed otherwise. Nor were the federal issues injected "only in anticipation of a defense" that might have been asserted by the defendants to a state law claim.

Compare Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 672 (1950).

On the contrary, Stone & Webster sought to invoke the federal courts' historical jurisdiction to declare a state statute unconstitutional. Stone & Webster thus sought to avoid costly state interference with its rights under federal law by obtaining injunctive relief. This state interference, which was neither limited to, nor created by, the institution of state proceedings, established a justiciable controversy supporting the exercise of jurisdiction over this action. See Lake Carriers' Association v. MacMullan, 406 U.S. 498, 506, 508 (1972); Rath Packing Co. v. Becker, 530 F.2d 1295 (9th Cir. 1975), aff'd sub nom. Jones v. Rath Packing Co., 430 U.S. 519 (1977); First Federal Savings & Loan of

Boston v. Greenwald, 591 F.2d 417 (1st Cir. 1979); Braniff International, Inc. v. Florida Public Service Commission, 576 F.2d 1100 (5th Cir. 1978); North Davis Bank v. First National Bank, 457 F.2d 820 (10th Cir. 1972); Rettig v. Arlington Heights Federal Savings & Loan Association, 405 F. Supp. 819 (N.D. Ill. 1975); Billy Jack For Her, Inc. v. New York Coat, Suit, Dress, Rainwear & Allied Workers' Union, 511 F. Supp. 1180, 1187 (S.D.N.Y. 1981).

The circumstances which gave rise to Stone & Webster's challenge to Connecticut's statute, as discussed above, did not involve the mere threat of state action; they involved a state statute which the courts below held has been preempted by ERISA which the state and others were actively invoking.

Hence, Stone & Webster's suit cannot be characterized, as was the action in Public Service Commission of Utah v. Wycoff, 344 U.S. 237 (1952) as nothing more than an attempt "to ward off possible action of the [State of Connecticut] by seeking a declaratory judgment to the effect that [Stone & Webster] will have a good defense when and if" the state's action is taken. 344 U.S. at 248. On the contrary, this action concerns a controversy which is "present and concrete" like the controversy involved in Public Utilities Commission of California v. United States, 355 U.S. 534, 539 (1958), a case in which this Court distinguished Wycoff as an action which was clearly premature. Therefore, the Wycoff dictum, which suggested that federal jurisdiction over

such premature actions is improper, cannot be applied to this case.

In fact, this Court has never applied the Wycoff dictum to suits, like Stone & Webster's, which presented a justiciable controversy supporting injunctive relief. See Braniff International, Inc. v. Florida Public Service Commission, 576 F.2d 1100, 1104 and 1106 n.9 (5th Cir. 1978).

Indeed, this Court has often heard preemption cases without even questioning the jurisdictional basis for such actions. See Jones v. Rath Packing Co., 430 U.S. 519 (1977) affirming Rath Packing Co. v. Becker, 530 F.2d 1295 (9th Cir. 1975) [discussing jurisdictional issue in detail]; Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981); New York Telephone Co. v. New York State

Department of Labor, 440 U.S. 519 (1979); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963). (See also, e.g., Kramarsky v. Delta Airlines, Supreme Court Docket No. 81-1578).

Moreover, federal jurisdiction cannot be attacked on the ground that the federal action will provide a defense to a state proceeding inasmuch as this Court has repeatedly considered federal actions raising state defenses without questioning jurisdiction. See Doe v. Bolton, 410 U.S. 179 (1973); California v. LaRue, 409 U.S. 109 (1972).

The argument advanced by the State of Connecticut would virtually remove federal jurisdiction over declaratory and injunctive challenges to state statutes based upon their repugnance to the federal constitution and federal

laws. Standing to bring a declaratory and injunctive action against a state statute requires a threat of enforcement of that statute against the declaratory plaintiff. Golden v. Zwickler, 394 U.S. 103 (1969). In satisfying that standing requirement, a declaratory plaintiff would run head-on into Connecticut's argument that federal jurisdiction does not lie because a defense to a state action is being sought. Such a result would be anomalous in view of the precedent for federal challenges to state statutes established by this, and other federal courts.

In short, it cannot be seriously questioned that a federal district court has federal question jurisdiction to hear an attack on a specific state

statute based on the express preemption of such statute by federal law.

III. The Question Concerning ERISA Preemption Of Section 31-51h Is Controlled By This Court's Decision in Alessi And Thus Does Not Warrant Further Argument.

The Court of Appeals, in affirming the judgment of the District Court, concluded that Conn. Gen. Stat. § 31-51h is preempted by ERISA insofar as its relates to employee benefit plans, like the Fund involved in this appeal, which are covered by ERISA. The Court of Appeals viewed this Court's decision in Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981), as controlling. 690 F.2d at 328. The analysis and holding of the court below was clearly correct.

Congress has expressly provided that ERISA is to be the sole regulatory

authority over employee benefit plans covered by its provisions. Congress determined that ERISA:

> shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title (emphasis added). 29 U.S.C. § 1144(a).

Many courts have had occasion to analyze the legislative history surrounding ERISA and have found substantial evidence that Congress intended ERISA to have broad preemptive powers. See, e.g., Wadsworth v. Whaland, 562 F.2d 70, 76-77 (1st Cir. 1977), cert. denied, 435 U.S. 980 (1978); Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294 (N.D. Cal. 1977), aff'd per curiam, 571 F.2d 5021 (9th Cir.), cert. denied, 439 U.S. 831

(1978). This Court is no doubt aware of ERISA's history in view of the decisions in Alessi and Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980). Discussion of that legislative history has therefore been omitted from this brief.[4]

4Congressional intent regarding ERISA preemption is further clarified by recent amendments to Sections 3 and 514(b) of ERISA. (See App C, D 10a-17a). Effective January 14, 1983, Pub. L. No. 94-473, § 302 adds to Section 514(b) of ERISA (29 U.S.C. § 1144(b)), a new paragraph (6) which insulates from preemption certain state laws designed to assure that multiple employer welfare arrangements are funded sufficiently to assure payment of benefits. By excluding from the definition of "multiple employer welfare arrangements" plans established or maintained pursuant to collective bargaining agreements, this amendment leaves intact the preemption of state laws relating to ERISA plans like the Fund which are maintained pursuant to collective bargaining agreements. See Pub. L. No. 97-473, § 302 (App. D. 15a). The Conference Committee Report leaves no doubt that this was Congress' explicit intention.

(footnote continued on next page)

In Alessi, this Court recognized the broad scope of ERISA's preemptive power and held that if a state law relates, either directly or indirectly, to an employee benefit plan covered by ERISA, it is preempted by the federal statute. Alessi, 451 U.S. at 525. In describing the workers' compensation law at issue in Alessi this Court stated:

(footnote continued)

Conference Report (P.L. 97-473), 3 PENS. PLAN GUIDE (CCH) ¶ 15,040. Similarly, by limiting the exemption to insurance laws, this amendment continues to require preemption of most state laws, including the statute involved here.

Where there has been judicial construction of a statute, and Congress "has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." North Haven Board of Education v. Bell, ___ U.S. ___, 72 L. Ed.2d 299, 317 (1982).

> It is of no moment that New Jersey intrudes indirectly, through a workers' compensation law rather than directly, through a statute called "pension regulation." ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern. For the purposes of the preemption provision, ERISA defines the term "State" to include: "a State, any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter 29 U.S.C. § 1144(c)(2) (emphasis added). ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the preemption provision.

Id.

Thus, the court below was correct in determining that the single substantive issue involved here is "whether § 31-51h of the General Statutes of Connecticut 'relate[s] to' an employee benefit plan." 690 F.2d at 328.

The statute at issue here clearly "relates to" an ERISA benefit plan. As the Court of Appeals noted below:

> The indisputable fact remains that the Connecticut statute requires an employer to make a contribution to the fund for a former employee - as such, a pension benefit - which was not bargained for or agreed to in the contract between the employer and the union. We conclude therefore that Section 31-51h of the General Statutes of Connecticut constitutes a forbidden state encroachment on a private employee benefit plan. Its only purpose is to add an additional statutory requirement - the cost of which is to be borne by the employer - to a private employee benefit plan. Thus, the state statute relates to an employee benefit plan as defined by ERISA and must be construed as preempted by 29 U.S.C. § 1144(a).

690 F.2d at 329.

By imposing an additional statutory requirement upon a privately

negotiated agreement, Connecticut's statute is, in effect, contravening federal law and policy. The decision in Alessi made that clear:

> Where, as here, the pension plans emerge from collective bargaining, the additional federal interest in precluding state interference with labor-management negotiations calls for preemption of state efforts to regulate pension terms . . . As a subject of collective bargaining, pension terms themselves become expressions of federal law, requiring preemption of intrusive state law.

451 U.S. at 525, 526. Since the statute at issue here intrudes directly upon an ERISA plan, it clearly "relates to" that plan and under the mandate of Alessi is preempted by federal law.

Furthermore, § 31-51h of the Connecticut General Statutes is not exempted from ERISA's preemption. As

this court noted in Alessi, "[t]he only relevant state laws, or portions thereof, that survive this preemption provision are those relating to plans that are themselves exempted from ERISA's scope." 451 U.S. at 523 n.20.[5]

The statute here at issue cannot be saved, as appellants have argued, on the basis that it relates to a plan which is exempt as "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance

[5]Certain statutes are also exempted from ERISA's preemption, namely those regulating insurance, banking, securities or "generally applicable criminal law[s]." 29 U.S.C. § 1144(b)(2)(A). None of these exemptions apply here. Note also that while the 1982 amendments to § 31-51h provide options relating to the manner of continued coverage, such laws still relate directly to the Fund since coverage must be equivalent to the Fund's coverage.

laws" (emphasis added). 29 U.S.C. § 1003(b)(3). That exemption cannot apply to the requirement that contributions to or benefits as provided by the Fund continue during workers' compensation, because, as this Court noted in Alessi, the exemption does not apply to save laws which relate to plans "which more broadly serve employee needs as a result of collective bargaining." 451 U.S. at 523 n.20. The benefits here involved, as the court below noted, are "broadly designed to serve employees' needs . . ." 690 F.2d at 330. Hence, the Fund "cannot be said to be maintained 'solely' for the purpose of complying with Connecticut's laws." Id. Since the appellants cannot claim that the Fund is free from ERISA's coverage they "cannot claim the exemption to preemption restricted to

laws governing such exempted plans." 451 U.S. at 524 n.20.

Moreover, benefits of the type involved here are not "workmen's compensation," within the meaning of 29 U.S.C. § 1003(b)(3). Standard Oil Co. of California v. Agsalud, 442 F. Supp. 695, 698 (N.D. Cal. 1977), aff'd, 633 F.2d 760 (9th. Cir. 1980), aff'd, 454 U.S. 801 (1981). "[W]orkman's compensation laws only replace lost income and defray medical expenses associated with work-related illness and injury." Id. Such benefits for work-related injuries are provided separately under Connecticut law and are expressly excluded from the Fund's coverage.

Hence, it is clear that Conn. Gen. Stat. § 31-51h is not saved by the provisions of 29 U.S.C. § 1003(b)(3).

In their Jurisdictional Statement appellants seek to carve out an additional exemption for "substantive state laws."

Appellants' theory finds no support in ERISA or case law. In fact, their theory is one consistently rejected by appellate courts. See Standard Oil Co. of California v. Agsalud, 633 F.2d 760, 765 (9th Cir. 1980), aff'd, 454 U.S. 801 (1981) ("There is, however, nothing in the statute to support such a distinction between the state laws relating to benefits as opposed to administration."); Buczynski v. General Motors Corp., 616 F.2d 1238, 1250 (3d Cir. 1980), aff'd sub nom. Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981); Wadsworth v. Whaland, 562 F.2d 70, 76, 77 (1st Cir. 1977), cert. denied, 435 U.S. 981 (1978);

Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294, 1298-1300 (N.D. Cal. 1977), aff'd per curiam, 571 F.2d 5021 (9th Cir.), cert. denied, 439 U.S. 831 (1978).

Moreover, appellants' argument is wholly inconsistent with Alessi. The statute at issue in Alessi, like the statute involved here, affected the amount of benefits recipients would receive under a pension plan. Clearly, the Alessi statute was a "substantive" statute under the definition proffered by appellants and under their theory should have been insulated from preemption. Of course, this Court found the Alessi statute to be preempted by ERISA and likewise should find the statute here preempted.

The inescapable conclusions reached by the court below - that § 31-51h "relates to" an ERISA plan and is

not otherwise exempted from preemption - were clearly compelled by Alessi. This Court need not, therefore, consider this issue further.

CONCLUSION

For the reasons stated herein and in the decision of the Court of Appeals for the Second Circuit, such decision should be affirmed.

RESPECTFULLY SUBMITTED,

THE APPELLEE
STONE & WEBSTER
ENGINEERING CORPORATION

By _____

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No. 82-1085

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

JOHN A. ARCUDI, Chairman,
Board of Compensation
Commissioners, State of Connecticut;
ROBIN W. WALLER, Worker's Compensation
Commissioner, Second District,
State of Connecticut

Appellant

v.

STONE & WEBSTER ENGINEERING CORPORATION

Appellees

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO AFFIRM

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUT

STONE & WEBSTER ENGINEERING CORPORATION	:	
Plaintiff-Appellee	:	CIVIL ACTION No. 81-7640
vs.	:	
DAVID B. ILSLEY, ET AL. Defendants-Appellants	:	

AFFIDAVIT SUPPORTING MOTION FOR STAY

STATE OF CONNECTICUT)
) ss: Hartford
COUNTY OF HARTFORD) January 25, 1983

CHRISTINA G. DUNNELL, Assistant Attorney General of the State of Connecticut, attorney for Defendants-Appellants Arcudi and Waller, being duly sworn, deposes and says:

1. These Defendants-Appellants have authorized the making of this motion, pursuant to Rule 44 of the Rules of the Supreme Court of the United States, for a stay of all declaratory relief

granted herein, pending review by the Supreme Court of the United States of the decision of this Court dated September 30, 1982.

2. That decision holds and declares C.G.S. § 31-51h to be preempted by the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001, et seq. (ERISA).

3. Unless stayed by this Court, the declaratory relief granted will permit all employers defending administrative proceedings before the Connecticut Worker's Compensation Commission to plead ERISA preemption as a means of defending against such proceedings. A recall of this Court's mandates and of the declaratory relief granted herein will maintain the status quo and will avoid irreparable injury to persons

invoking or relying on C.G.S. § 31-51h to provide insurance coverage during a period of disability.

4. The District Court had previously granted a stay to apply during the pendency of this appeal to the United States Court of Appeals for the Second Circuit.

5. At the time of this Court's decision on September 30, 1982, the Worker's Compensation Commission believed that employers would continue to pay the benefits required under C.G.S. § 31-51h because of a change in the law that terminates this obligation after one hundred four weeks. For this reason, no stay was requested as no harm appeared imminent.

6. At this time, cases have developed before the Compensation Commission wherein employers do not wish to continue benefits inasmuch as no stay has issued from this Court.

7. On December 14, 1982, the United States Supreme Court noted probable jurisdiction in a case which raises an issue identical to the jurisdictional claims in the present case with regard to whether federal question jurisdiction will lie in cases involving ERISA preemption. The case before the Supreme Court addresses another issue before this Court in the present case: the extent of ERISA preemption and its application in areas wherein states have traditionally exercised police powers. Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust, 679 F.2d 1307 (9th Cir. 1982).

8. The jurisdictional statement in the present case was docketed on December 23, 1982.

9. It is therefore respectfully requested that this Court recall its mandates herein and stay all declaratory relief granted herein pending review by the Supreme Court of the United States.

Christina G. Dunnell

Subscribed and sworn to before me this 25th day of January, 1983.

DAVID M. TEED
Commissioner of the Superior Court

APPENDIX B

PUBLIC ACT NO. 82-398,
SECTION 3 AS CODIFIED
CONN. GEN. STAT. § 31-284b

Sec. 31-284b. Employer to continue insurance coverage or welfare fund payments for employees eligible to receive workers' compensation. Use of second injury fund. (a) In order to maintain, as nearly as possible, the income of employees who suffer employment-related injuries, any employer, as defined in section 31-275, who provides accident and health insurance or life insurance coverage for any employee or makes payments or contributions at the regular hourly or weekly rate for full-time employees to an employee welfare fund, as defined in section 31-53, shall provide to such employee equivalent insurance coverage or welfare fund payments or contributions while the employee is

eligible to receive or is receiving workers' compensation payments pursuant to this chapter, or while the employee is receiving wages under a provision for sick leave payments for time lost due to an employment-related injury.

(b) An employer may provide such equivalent accident and health or life insurance coverage or welfare fund payments or contributions by: (1) insuring his full liability under this act in such stock or municipal companies or associations as are or may be authorized to take such risks in this state; (2) creating an injured employee's plan as an extension of any existing plan for working employees; (3) self-insurance; or (4) by such combination of the above-mentioned methods as he may choose.

(c) In the case of an employee welfare fund, an employer may provide

such equivalent protection by making payments or contributions for such hours of contributions established by the trustees of the employee welfare fund as necessary to maintain continuation of such insurance coverage when such amount is less than the amount of regular hourly or weekly contributions for full-time employees.

(d) In any case where workers' compensation payments to an individual for total incapacity under the provisions of section 31-307 continue for more than one hundred four weeks, the cost of such accident and health insurance or life insurance coverage after the one hundred fourth week shall be paid out of the second injury fund in accordance with the provisions of section 31-349.

(e) Such accident and health insurance coverage may include but shall not be limited to coverage provided by insurance or directly by the employer for the following health care services: Medical, surgical, dental, nursing and hospital care and treatment, drugs, diagnosis or treatment of mental conditions or alcoholism, and pregnancy and child care.

APPENDIX C

Periodic Payment Settlement Act of 1982, Pub. L. No.97-473, §§ 301, 302, AMENDS SECTION 514(b) OF ERISA (29 U.S.C. § 1144(b)) BY ADDING THE FOLLOWING PARAGRAPHS:

(5) (A) Except as provided in subparagraph (B), subsection (a) shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) -

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after the date of the enactment of this paragraph), but the Secretary may enter into cooperative arrangements under paragraph and section 506 with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6) (A) Notwithstanding any other provision of this section -

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and

is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides -

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this title, any

law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this title.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 3(1) and section 4 necessary to be considered an employee welfare benefit plan to which this title applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to

which the provisions of this title apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

APPENDIX D

Periodic Payment Settlement Act of 1982, Pub. L. No. 97-473, § 302 AMENDS SECTION 3 OF ERISA (29 U.S.C. § 1002) BY ADDING THE FOLLOWING PARAGRAPH

(40) (A) The term "multiple employer welfare arrangement" means an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained -

(i) under or pursuant to one or more agreements which the

Secretary finds to be collective bargaining agreements, or

(ii) by a rural electric cooperative.

(B) For purposes of this paragraph -

(i) two or more trades or businesses, whether or not incorporated, shall be deemed a single employer if such trades or businesses are within the same control group,

(ii) the term "control group" means a group of trades or businesses under common control,

(iii) the determination of whether a trade or business is under "common control" with another trade or business shall be determined under regulations of the Secretary applying principles similar to the principles applied

in determining whether employees of two or more trades or businesses are treated as employed by a single employer under section 4001(b), except that, for purposes of this paragraph, common control shall not be based on an interest of less than 25 percent, and

(iv) the term "rural electric cooperative" means -

(I) any organization which is exempt from tax under section 501(a) of the Internal Revenue Code of 1954 and which is engaged primarily in providing electric service on a mutual or cooperative basis, and

(II) any organization described in paragraph (4) or (6) of section 501(c) of the Internal Revenue Code of 1954 which is exempt from

tax under section 501(a) of such Code and at least 80 percent of the members of which are organizations described in subclause (I).